FOR ARGUMENT

No. 77-375

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL., APPELLANTS

v.

CAROLINA ENVIRONMENTAL STUDY GROUP, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

REPLY BRIEF FOR THE UNITED STATES NUCLEAR REGULATORY COMMISSION

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1. Appellees assert (Br. 33-40) that this Court should evaluate the constitutionality of the Price-Anderson Act's limitation of liability under a standard more exacting than the rational basis test traditionally used for evaluating statutes "adjusting the burdens and benefits of economic life." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15. A higher standard of review is necessary, according to appellees, because of the serious consequences of a major nuclear accident. Drawing an analogy to *Skinner* v. *Oklahoma*, 316 U.S. 535, in which this Court applied a strict standard of review to a compulsory sterilization statute, appellees state that "the power to build nuclear plants may produce equally devastating effects" (Br. 34) and contend that at least an intermediate standard of review therefore is appropriate.

But the question before this Court is not the constitutionality of Congress' decision to encourage the construction of nuclear power plants. Indeed, appellees emphasize repeatedly that their only objection is to the compensation provisions of the Price-Anderson Act, not to the nuclear power program itself (Br. 9, 31, 59). Thus this case involves, like *Usery* and the other cases cited in our opening brief at pages 14, 16 and 29-30, simply the question of the rationality of a statutory allocation of economic benefits and burdens. It involves only money: who is entitled to how much and when.[1] There is accordingly no reason for this Court to require more than a rational basis to uphold the legislative judgment.[2]

2. Appellees have clarified their argument that their property has been "taken for public use" in violation of the Just Compensation Clause by explaining that this argument "relates solely" to their rights in real and

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[1]If appellees' position were correct, the rational basis standard would be abolished. The reasoning would run: every decision involving money could have important consequences; a decision to deny disability or welfare benefits could lead to starvation or discomfort; surely the government may not impose death or discomfort without a strong showing of necessity (see *Gregg* v. *Georgia*, 428 U.S. 153); therefore any denial of money to potentially needy persons must be justified by more than a mere rational basis. The Court has rejected this argument. Decisions to pay or not to pay money, even to the most needy persons, are assessed under the rational basis test. *Califano* v. *Jobst*, No. 76-860, decided November 8, 1977; *Weinberger* v. *Salfi*, 422 U.S. 749. Cf. *Maher* v. *Roe*, 432 U.S. 464 (decision not to pay for abortions supported by rational basis, even though the state could not interfere in the abortion decision without a compelling justification).

[2]Even if an intermediate test is appropriate, we submit that, for the reasons explained in our opening brief (pages 14-20), the Price-Anderson Act does "serve important governmental objectives and [is] * * * substantially related to achievement of those objectives" (*Craig* v. *Boren*, 429 U.S. 190, 197).

personal property that would be affected by a major nuclear accident (Br. 61 and n. 52). But the Price-Anderson Act's limitation of liability effects no "taking" for Fifth Amendment purposes of any such right. It does not itself deprive anyone of any interest in any real or personal property; it does not assert any dominion over any such property, or even limit its possible uses or decrease its value in any way. Cf. *United States* v. *Kansas City Insurance Co.*, 339 U.S. 799, 809-812; *United States* v. *Causby*, 328 U.S. 256, 261-267; *Richards* v. *Washington Terminal Co.*, 233 U.S. 546, 553-558.

Indeed, petitioners apparently do not contend that either the enactment of the limitation of liability, or even the construction of the nuclear power plants that may be influenced by that enactment, has taken their property without just compensation.[3] They maintain simply that "the complete destruction of appellees' property by a nuclear accident, occurring at one of Duke's plants, *would be* a 'taking' by the United States, as that term is defined in the Fifth Amendment" (Br. 62; emphasis added). But that contention does not pertain to the constitutionality of the Act itself; it is no more than an assertion that, if there were a major nuclear accident that destroyed appellees' property, they would be entitled to "just compensation" despite the limitation on liability. This Court need not decide that abstract and speculative question at this time.[4]

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[3]The record demonstrates that the construction of the Duke nuclear power plants at issue here has had no adverse effects on local property values (App. 175; J.S. App. 16a; Duke Br. 12a).

[4]As this Court has observed, "[t]raditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case." *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168. Those circumstances include the nature of the particular injury suffered, the amount of

Even if it were possible to conceive of particular applications of the limitation of liability provisions that would be inconsistent with the Just Compensation Clause, that does not mean that these provisions are unconstitutional on their face, because, as we explained in our opening brief, their primary effect is to assure, rather than deny, just compensation.

3. Appellees adopt (Br. 35-36 and n. 34) the argument of several states and agencies that the Price-Anderson Act infringes on state sovereignty. But *National League of Cities* v. *Usery*, 426 U.S. 833, on which appellees and *amici* principally rely, offers them no support. As this Court repeatedly emphasized, *National League* involved legislation directed against the states as states and impinging directly on governmental functions essential to the states' independent existence. The Court cast no doubt on statutes that directly affect private parties and touch only indirectly on the states. The Price-Anderson Act affects the states only by placing them on the same footing as other parties that may be injured by an

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compensation available, and whether the particular incident constituted a "taking for public use." Thus, although we believe that the Fifth Amendment claims passed on by the district court are ripe for review, we do not believe it appropriate for this Court to consider here whether some possible injury from a conceivable nuclear disaster might, in the absence of an adequate federal response, deprive someone, possibly one of appellees, of some property. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143-148 (a "taking" claim is not ripe until the operation of the taking against identified persons is no longer hypothetical or speculative). We doubt, moreover, that a nuclear accident would be a taking *by the United States* within the meaning of the Fifth Amendment. Cf. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (activities of regulated utility are not state action). There is no need, however, to pursue that matter here.

accident; many statutes treat states and private parties identically in permitting recoveries for injuries. See, *e.g., Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (antitrust laws). Moreover, preemption of state law is a necessary consequence of the Supremacy Clause; it would be untenable to argue that the displacement of state preferences compelled by the Supremacy Clause violates some right of the states.[5] See, *e.g., Ray* v. *Atlantic Richfield Co.,* No. 76-930, decided March 6, 1978 (state tanker regulation law preempted even though preemption displaces important state policies).

For these reasons, as well as those discussed in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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Solicitor General.

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[5]When Minnesota contended that federal regulation of atomic energy unconstitutionally infringed its power to protect the health, safety and welfare of its residents, this Court summarily rejected the argument. *Northern States Power Co.* v. *State of Minnesota,* 447 F. 2d 1143 (C.A. 8), summarily affirmed, 405 U.S. 1035.

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